

AGENDA ITEM #2

Approval of Minutes of March 13, 2007 Meeting and April 10, 2007 Meeting

NATURAL RESOURCES ADVISORY COUNCIL

***DRAFT* Minutes of the March 13, 2007 Meeting**

Members Present

Patrick Early, Chair
Amy Travis, Vice Chair
William Wert
Bill Pippenger
Donald Van Meter
Jim Tractman
Tom Rethlake

Department of Natural Resources Staff

Robert Carter	Executive Office
Ron McAhron	Executive Office
John Davis	Executive Office
Burgess Brown	Executive Office
Chris Smith	Executive Office
Cheryl Hampton	Human Resources
Sam Purvis	Law Enforcement
Phil Marshall	Entomology and Plant Pathology
Glen Salmon	Fish and Wildlife
Linnea Petercheff	Fish and Wildlife
Mark Reiter	Fish and Wildlife
John Bacone	Nature Preserves
Emily Kress	Outdoor Recreation
Carman Jackson	Outdoor Recreation
Terri Price	Water
Kathleen McLary	Indiana State Museum and Historic Sites
Haley Tallman	Indiana State Museum and Historic Sites

Natural Resources Commission Staff

Stephen Lucas	Sandra Jensen
Jennifer Kane	Debbie Michaels

Guests

Dick Mercier	Bryan Poynter
Jack Corpuz	Jane Ann Stautz
Sam Bond	Larry Klein
Richard Mangus	Thomas Easterly

Patrick Early, Chair, called the meeting to order at 10:35 a.m., EST in the Multipurpose Room, at the Indiana State Museum, 650 West Washington Street, Indianapolis, Indiana. With the presence of seven members, the Chair observed a quorum.

Donald Van Meter moved to approve the minutes of December 13, 2006. William Wert seconded the motion. Upon a voice vote, the motion carried.

Discussion by Advisory Council Chairman Early, Commission Chairman Poynter and Director Carter of Relationship between the Advisory Council and the Natural Resources Commission

Chair Early noted that Robert Carter, Jr., Department Director, and Bryan Poynter, Commission Chair, along with other Commission members and guests, were present at today's meeting. Chair Early indicated that he and Vice Chair Travis, and other Council members have "wrestled with what is exactly" the Advisory Council's "role and authority, and what purpose do we play in the inter-workings of the DNR." Chair Early requested input from Council members and Commission members.

Chair Early noted that the proposed "one buck rule" was the first issue presented to the Advisory Council. "We listened to testimony, and then we got to a point where it may have been appropriate to take some sort of action in making a recommendation". Chair Early indicated, however, that under the previous Department directorship, the Advisory Council was informed that the Council's role was "not to make affirmative recommendations, to take votes, and so on." He said, "It appears that the statute does not only allow that, but really that's part of the purpose of us being here."

Chair Early asked whether Robert Carter had "any thoughts" regarding the Advisory Councils' role. Carter indicated that he agreed with the Chair's interpretation. "I agree with what you just said. I think that is your role, and that's what I want to use [the Advisory Council] for is to bounce ideas off of and move things forward to the Commission. I think the Commission would appreciate that, too." Carter said the Advisory Council would be a "starting point" for many Department issues. He also said the Advisory Council should be used to its "fullest extent", and it could be "very beneficial" to the Commission and the Department.

Commission Chair Bryan Poynter said, "I couldn't agree more. I know we are all anxious to develop some form of working document, or policy, or some working protocol such that it can be efficient between the Department, the Council, and the Commission" resulting in "not much ambiguity" as to the Council's role. "I want the process to work well" for the Department, the Commission, and "ultimately to better serve the constituent groups".

At the Chair's request, Stephen Lucas, Director of the Natural Resources Commission, Division of Hearings, provided a brief explanation of the rule adoption process.

Donald Van Meter, Council member, said, "As an 'advisory' council, that's exactly what we do is to provide opinions either to the Commission, especially the Commission, or perhaps to the Department, and they are, indeed, opinions and advice". He said advice

could be given to the Commission “from a different set of people with different perspectives...whether you take it or not it’s another point of view”.

The Chair characterized the Council’s role under the previous directorship as a “listening” council. He noted that the emerald ash borer issue presented at the Council’s previous meeting was “fascinating, but you could have watched it on the Discovery Channel.” He added, “I just want all of us to feel like this is worth our time.”

Vice Chair, Amy Travis, indicated that she had reviewed the Advisory Council’s governing statutes, and she considered each of the Governor’s appointments to the Council and the differing manner in which each appointee uses the Department. She characterized the Council as “a collection of people with very different” educational and life experiences. The Vice Chair said, “I think that either the Commission, the Director, or somebody within the Department should give [the Council] something to study or an idea they are interested in developing further; that we are to listen to scientific opinion, both state supported and independent scientific opinion when appropriate; that we are to listen to public opinion from various stakeholder groups, which I would say would include anything from hunting groups to interest groups be they environmental interest groups. Then use our combined experience to give an advisory opinion back to the Commission or the Director. I see our role as being an independent opinion and not being told, ‘well, we want you to come to this conclusion.’”.

Vice Chair Travis noted that the issues the Department faces are “so huge”. She noted that there may be certain natural resource issues where the Council may be able to assist and “direct” the Department. Chair Early agreed, and he added, “We don’t want to become more bureaucracy, cumbersome, and more administration. That is not meaningful for anybody.”

Tom Rethlake, Council member, asked, “Do the same people that testify in front of [the Council] duplicate their presentation to the Commission?” Commission Chair Poynter noted that Department staff members may be present at the Commission meetings to answer questions. “The staff does a wonderful job—in a very nice package—briefing and summarizing very complicated issues, but not from the standpoint that I read in the [Council] minutes regarding the emerald ash borer presentation, for example, not to that level”.

The Vice Chair said that she sees a “decrease in bureaucracy. I see the Director giving us something to study...and we look into it and give an opinion...saving [the Department] a bunch of time and energy because it’s kind of condensed”.

Commission Chair Poynter said, “We have a valuable resource in this Council. I want to make sure that it is utilized and the agenda is populated far enough in advance so that the Commission, and ultimately the Department, can provide the services to constituent groups that are needed.”

William Wert, Council member, said “I always felt that we were a venue sometimes for the public to begin a process and then moving forward. We would get a distillation of facts and take testimony, and would then make our recommendation, which I always thought carried some weight”. He noted that the Council may be “narrowing” administration, time, and consumption of resources in some instances.

Bill Pippenger, Council member, noted that “years ago” the previous councils assisted in writing the conservancy district nonrule policy document. “It was a really tough, long-term project.... It was a good thing to do, and it needed to be done.” He said the resulting document “helped simplify the conservancy process.”

Van Meter noted that the Council also assisted with the formation of the State’s drought plan. “As the Department was writing [the plan], the Department would often use the Advisory Council for some feedback. I think that was a very productive use of our time.” He said that since the Advisory Council participated in the formation of the drought plan, the Commission “did not have to start from ground one.”

John Davis, Deputy Director of the Bureau of Lands, Recreation, and Cultural Resources added that the issue of “running dogs” on fish and wildlife areas was also presented to the Advisory Councils. “We ended up not taking that to the Commission, because the Advisory Council continued to ask us questions that we were not answering very well.” Van Meter added, “But we didn’t make that decision. You made that decision, but we provided some thoughts so that [the Department] could make a more intelligent decision.”

Chairman Early noted that the discussions have provided “more direction” regarding the Council’s role.

Jim Trachtman, Council member, said that “being an advisory body is the correct place to be.” He noted that the present Council is a “blending” of the two previous councils. Trachtman said the previous councils had reviewed Department fees along with rates for the state park inns. “I thought those were fascinating...I thought we gave some very good advice there”. He said that as Department issues arise the Council “can be the eyes and ears, and be a place for the public to come. We can spend the time and listen to them, and come up with some opinions and advice.”

Commission Chair Poynter invited other Commission members to offer comment.

Jane Ann Stautz, Commission Vice Chair, indicated that she has served on the Commission for “several years,” and also serves as the Chair of the Commission’s AOPA (Administrative Orders and Procedures Act) Committee. “There are some matters that [the Committee] is seeing more and more of after going through the administrative process with regard to the use of our freshwater lakes”. She noted that there “are some rules that probably could use examination and probably further definition... ‘group piers’ versus ‘marinas’”. Stautz said the Advisory Council could “look at what are the implications of some of the terms or application of those to help provide guidance to the

Department”. She said the Council could review other neighboring states’ policies “to get ideas and bring that together with advice and recommendations”. She also said “balance of the use” of state parks may be an issue for Council review. Stautz said Department issues could be “fine tuned a little further” by the Council prior to Commission consideration. “I think that would be very helpful.”

Larry Klein, Commission member, reflected that historically with advisory councils and commissions there is a problem of “redundancy of character and the need to discern the difference in the duties of the two bodies”. He noted that the Commission has statutorily prescribed functions and “those functions can’t really be assigned to some other group...the desire to always be active can create more work just in the attempt to be active”. Klein noted that he was “new to the Commission, but not new to the dilemma.” He said, “We need to avoid the pitfall of redundancy.”

Commission Chair Poynter asked Commission member Thomas Easterly whether the Indiana Department of Environmental Management (IDEM) has an advisory council or group. Easterly explained that IDEM has boards that review governing rules. He said IDEM boards have “up or down voting, not just advice, so the board does not have to agree with me” as IDEM Commissioner.

Commission Chair Poynter asked for the perspective of Jack Corpuz, a representative of a variety of sportsmen’s groups. Corpuz noted that there was a move a few years ago to dissolve councils, and the sportsmen’s groups “fought to keep the Council—at least as merged.... We look at the Council as a sounding board for particular issues.” He indicated that issues that are “somewhat controversial” should be presented to the Council prior to Commission consideration. “It does kind of lengthen the process. It does kind of duplicate some of the work, but on those issues that are controversial like that I think you need to be pretty darn sure what kind of decision you are going to make. The more help you get the better off you’ll be.” Corpuz noted that Council members “deserve to have the opportunity to vote and make their feelings known to the Commission.”

Next Meeting of the Natural Resources Advisory Council

The next meeting of the Natural Resources Advisory Council is April 10, 2007 to begin at 10:30 a.m., EDT (9:30 a.m., CDT) in the Board Room, Indiana State Museum, 650 West Washington Street, Indianapolis, Indiana.

NATURAL RESOURCES ADVISORY COUNCIL
***DRAFT* Minutes of the April 10, 2007 Meeting**

Members Present

AmyMarie Travis, Vice Chair
William Wert
Bill Pippenger
Donald Van Meter
David Lupke

Department of Natural Resources Staff

Ron McAhron	Executive Office
John Davis	Executive Office
Cheryl Hampton	Human Resources
Lt. Col. Sam Purvis	Law Enforcement
Ann Knotek	Legal

Natural Resources Commission Staff

Stephen Lucas
Jennifer Kane

AmyMarie Travis, Vice-Chair, opened the discussions at 10:34 a.m., EDT in the Board Room at the Indiana State Museum, 650 West Washington Street, Indianapolis, Indiana. In the absence of a quorum, she observed that official action could not be taken, but there could be informal discussions of agenda items.

Scheduling of 2007 Meeting Dates and Locations

Bill Pippenger observed that the members had previously expressed a preference for holding meetings on Wednesdays, but the proposed dates were Tuesdays. He said he had scheduling conflicts on Tuesdays and wondered whether the dates could be reset for Wednesdays. Donald Van Meter also indicated the Wednesday date would be preferable for him for the June meeting. Those in attendance asked John Davis to discuss with Chairman Early the possibility of resetting each of the proposed dates on Tuesdays for one day later on Wednesdays.

Don Van Meter said he conceptually liked the idea of holding the August meeting in conjunction with the Indiana State Fair but wondered whether there was a suitable facility on the Fair Grounds. The Vice Chair observed that the Open Door Law would prohibit requiring an entrance fee, so, if the meeting were to be held on the grounds, a provision would need to be implemented to allow public attendance without paying an entry fee. The Advisory Council members asked John Davis to determine whether a suitable location could be obtained that would conveniently allow for a tour within the Fair Grounds but that was itself outside the gates.

Report from Bureau of Water and Mineral Resources

Ron McAhron reported that, if enacted as currently drafted, Indiana House Bill 1738 would establish new responsibilities for the Advisory Council. He suggested consideration of the legislation might become an appropriate topic for the June meeting.

Consideration of Tendered Project Regarding Riparian Zones in Public Waters (Administrative Cause No. 07-045A)

Steve Lucas, Director of the NRC's Division of Hearings, opened an informal discussion of this subject. Included were discussions of what constitute a "navigable" waterway and a "public freshwater lake". He said for consideration was a project to help identify how riparian zones would be delineated within a navigable waterway or a public freshwater lake. This delineation was distinguished from how the delineation would be performed on a private waterway. Lucas said the Advisory Council was being asked to choose among five options:

- (1) Continue exclusively with the current approach of developing precedents through the Indiana Appeals Court and Supreme Court and the NRC's administrative law judges and its AOPA Committee (published in "Caddnar").
- (2) Develop a "nonrule policy document" to synthesize and conceptualize the precedents developed under option (1), with the possible inclusion of principles used by licensed surveyors.
- (3) Develop rules to direct the application of principles pertaining to the delineation of riparian zones.
- (4) Recommend legislation to direct the application of principles pertaining to the delineation of riparian zones.
- (5) Some combination of options (1) through (4).

David Lupke asked what would be the legal effect of a "nonrule policy document". Lucas responded that it would be advisory and would not have the force and effect of law. A "nonrule policy document" could, however, synthesize the precedents and offer them in a manner that was better organized than individual precedents. A new rule or a new statute would have the force and effect of law. AmyMarie Travis said a "nonrule policy document" would be similar to a learned treatise. It could provide support for the agency decision makers and the public in determining riparian boundaries.

Ann Knotek of the DNR's Office of Legal Counsel directed the attention of the Advisory Council to IC 14-26-2-23, a copy of which is attached to these Minutes as an Appendix. She said this statutory section was at the core of DNR's regulatory responsibilities for the placement of piers and similar structures. These structures are often what are at issue in a delineation of riparian zones. She said this section received major amendments in 2006

to clarify and augment the agency's authority. In particular, Knotek identified subsection (e)(2):

(e) The commission shall adopt rules under IC 4-22-2 to do the following:

....

(2) Provide objective standards for issuing permits under this section, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:

(A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the lake or rights to access the lake; and

(B) shall exempt any class of activities from licensing, including temporary structures, if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in [IC 14-26-2-5].

Knotek wondered if the Advisory Council should recommend action to the Natural Resources Commission to implement this expanded statutory responsibility.

Don Van Meter indicated he was comfortable with moving forward to develop a nonrule policy document or a rule to address the delineation of riparian zones. The members asked Lt. Col. Samuel Purvis whether the Division of Law Enforcement would prefer a rule or a nonrule policy document. Purvis responded that having experience with a nonrule policy document was a good approach because it would allow the agency to better understand how a process would work. After gaining the experience, a determination could be made to adopt a rule for all or portions of the document. Bill Pippenger said he supported Purvis's view.

David Lupke observed that riparian rights disputes, particularly as to pier placements, were a growing issue in northeastern Indiana. He suggested that the obvious places for development along major public freshwater lakes, such as Lake James in Steuben County, had been largely filled. Developers were now in the position of seeking to develop wetlands or to use creative approaches, such as developing condominiums landward of the shoreline with access to a lake through some funneling mechanism.

William Wert asked whether there have been determinations about the capacity of a lake to handle increasing boating pressure. Can the number of boats become so large that enjoyment is impeded, and a lake suffers environmental damage?

John Davis said Wert's question pointed to another public waters issue that the DNR expects to bring to the Advisory Council. Carrying capacity for a navigable waterway, Sugar Creek in western Indiana, is a challenge that needs to be addressed.

Lt. Col. Purvis said the agency was examining carrying capacity within lakes. He said other Great Lakes states have sought to address the issue, but responses have typically been site specific and subjective. Also, the challenge is not just boats. He said the Division of Fish and Wildlife is concerned with the adverse environmental impact that can result from shadows thrown by an excessive number of piers.

John Davis asked Lucas whether he and DNR staff could develop a draft nonrule policy document to address riparian zones and tender the draft for review by the Advisory Council. Lucas responded that he could or would welcome a more active participation by the Advisory Council in developing the document if those were the wishes of the members.

Van Meter said this topic presented a lot of interesting issues. He observed that the backup materials showed there were decisions that could form the basis for a meaningful document.

Lupke said the subject provided for a fascinating discussion and a topic of great importance to his portion of the state. Pippenger noted there were also many related issues pertaining to the growing challenges posed for the protection of Indiana's public freshwater lakes.

Vice Chair Travis emphasized the commitment made to keep meetings on schedule. She said the five members of the Advisory Council had participated in an excellent discussion of this issue and in an appropriate consideration of the options. The hour had arrived for the meeting to close, but she suggested that a good foundation was achieved for seeking input by a quorum as to how best to proceed.

Adjournment

At approximately 12:02 p.m., the meeting adjourned.

Next Meeting of the Natural Resources Advisory Council

The next meeting of the Natural Resources Advisory Council will likely be in Indianapolis on June 12 or June 13, 2007.

Appendix IC 14-26-2-23

Sec. 23. (a) Unless a person obtains a permit from the department under this section and conducts the activities according to the terms of the permit, a person may not conduct the following activities:

(1) Over, along, or lakeward of the shoreline or waterline of a public freshwater lake:

(A) excavate;

(B) place fill; or

(C) place, modify, or repair a temporary or permanent structure.

(2) Construct a wall whose lowest point would be:

(A) below the elevation of the shoreline or waterline; and

(B) within ten (10) feet landward of the shoreline or waterline, as measured perpendicularly from the shoreline or waterline;
of a public freshwater lake.

(3) Change the water level, area, or depth of a public freshwater lake or the location of the shoreline or waterline.

(b) An application for a permit for an activity described in subsection (a) must be accompanied by the

following:

- (1) A nonrefundable fee of one hundred dollars (\$100).
- (2) A project plan that provides the department with sufficient information concerning the proposed excavation, fill, temporary structure, or permanent structure.
- (3) A written acknowledgment from the landowner that any additional water area created under the project plan is part of the lake and is dedicated to the general public use with the public rights described in section 5 of this chapter.

(c) The department may issue a permit after investigating the merits of the application. In determining the merits of the application, the department may consider any factor, including cumulative effects of the proposed activity upon the following:

- (1) The shoreline, waterline, or bed of the lake.
- (2) The fish, wildlife, or botanical resources.
- (3) The public rights described in section 5 of this chapter.
- (4) The management of watercraft operations under IC 14-15.
- (5) The interests of a landowner having property rights abutting the lake or rights to access the lake.
- (d) A contractor or agent of the landowner who engages in an activity described in subsection (a)(1), (a)(2), or (a)(3) must comply with the terms of a permit issued under this section.
- (e) The commission shall adopt rules under IC 4-22-2 to do the following:

- (1) Assist in the administration of this chapter.
- (2) Provide objective standards for issuing permits under this section, including standards for the configuration of piers, boat stations, platforms, and similar structures. The standards:

- (A) may provide for a common use if the standard is needed to accommodate the interests of landowners having property rights abutting the lake or rights to access the lake; and

- (B) shall exempt any class of activities from licensing, including temporary structures, if the commission finds that the class is unlikely to pose more than a minimal potential for harm to the public rights described in section 5 of this chapter.

- (3) Establish a process under IC 4-21.5 for the mediation of disputes among persons with competing interests or between a person and the department. A rule adopted under this subsection must provide that:

- (A) if good faith mediation under the process fails to achieve a settlement, the department shall make a determination of the dispute; and

- (B) a person affected by the determination of the department may seek administrative review by the commission.